GLO-CDR Regulatory Oversight – Policy Memo on Choice Limiting Actions

Date: August 30, 2021
To: CDBG-DR Subrecipients/Responsible Entities/Certifying Officers
From: Jill Seed, Director, GLO-CDR Regulatory Oversight
Through: Heather Lagrone, GLO-CDR Senior Deputy Director
Subject: Responsibilities of Subrecipients/Responsible Entities/Certifying Officers regarding Limitations on Activities Pending Clearance (Choice Limiting Actions) 24 CFR 58.22

Subgrantees who receive CDBG-DR funds administered by the TXGLO are considered responsible entities (REs), also referred to as subrecipients, and must complete an environmental review compliant with 24 CFR 58 on all project activities before CDBG-DR funds are obligated. Each RE must designate a Certifying Officer who is ultimately responsible for signing off on the completeness of environmental reviews as described in 24 CFR 58.13. The RE/Certifying Officer is also responsible for ensuring that the timing of the environmental review process is consistent with the requirements outlined in 24 CFR 58.22 - Limitations on Activities Pending Clearance, commonly referred to as "choice limiting actions."

Choice limiting activities occur in two commonly observed missteps:

1. Prior to the completion of the environmental review and;
2. After completing the environmental review and receipt of the Authority to Use Grant Funds (AUGF) if the RE fails to adhere to the project re-evaluation process required by 24 CFR 58.47 and GLO.

HUD's regulations at 24 CFR 58.22 prohibit grant recipients and their partners from committing or spending HUD or non-HUD funds on any activity that could have an adverse environmental impact or limit the choice of reasonable alternatives prior to completion of an environmental review once a project has become "federal." This prohibition on "choice-limiting actions" prohibits physical activity, including acquisition, rehabilitation, and construction, as well as contracting for or committing to any of these actions. Other regulatory requirements are found in the Council of Environmental Quality regulations (NEPA) at 40 CFR 1502.2(f), which require that agencies not commit resources prejudicing selection of alternatives before making a final decision. Per 24 CFR 58.10, Part 58 environmental clearance requires RE's to comply with NEPA.

The restriction on undertaking or committing funds for choice-limiting actions does not apply to undertakings or commitments of non-federal funds before a project participant has decided to apply for HUD funding. A party may begin a project in good faith as a private project and is not precluded from later deciding to apply for federal assistance. However, when the party applies for federal assistance, it will generally need to cease further choice-limiting actions on the project until the environmental review process is complete.

24 CFR 58.22(a) further expands upon this regulation to state that neither a recipient nor any participant in the development process, including public or private nonprofit or for-profit entities, or any of their contractors, may commit HUD assistance under a program listed in § 58.1(b) on an activity or project until HUD or the state has approved the recipient's RROF and the related certification from the responsible entity. In addition, until the RROF and the related certification have been approved, neither a recipient nor any participant in the development process may commit non-HUD funds on or undertake an activity or project

under a program listed in § 58.1(b) if the activity or project would have an adverse environmental impact or limit the choice of reasonable alternatives.

Anytime there is a change in the project's scope of work post-AUGF, regardless of magnitude, the re-evaluation process in 24 CFR 58.47 must be followed in accordance with GLOs Project Re-evaluation process prior to any work being initiated or funded. If a RE fails to comply with 24 CFR 58.47 and the GLO Project Reevaluation Process post-AUGF, a choice limiting action as described in 24 CFR 58.22(a) may have occurred.

For brevity, a re-evaluation is required when the project footprint or area of potential effect (APE) changes regardless of the amount of linear feet/area, project activities are added/removed, unexpected conditions arise, or changes are made to the nature, magnitude, or extent of the project. If the original finding is assessed as still valid, the environmental review record (ERR) would be updated with a memo to the file, which is commonly referred to as a Letter of Re-evaluation or LRE. If the original finding is assessed as no longer valid, the RE may have to prepare a new environmental review record and proceed with the approval process, which includes but is not limited to a new environmental review record, public notices, public comment and objection periods, and a new Request for Release of Funds (RROF) and AUGF.

According to 24 CFR 58.72, in cases where the GLO is exercising HUD's responsibilities outlined in 24 CFR 58.18 and has approved a certification and RROF but subsequently learns that the RE violated 58.22(a) or otherwise failed to comply with any applicable environmental authority, the GLO can impose appropriate remedies and sanctions in accordance with the law and regulations for the program under which the violation was found. This may include repayment of federal funds.

Please refer to **GLOs Project Re-evaluation Policy Memo** for additional information on ensuring compliance when a project's scope of work changes. Please note that these procedures may change, and the RE should always contact the Regulatory Oversight team at env.reviews@recovery.texas.gov for the most recent guidance.

The GLO requests acknowledgment of these requirements by each REs Certifying Officer. Please sign and submit to the appropriate GLO Grant Manager.

GLO Contract #: _____

Responsible Entity Certifying Officer name: _____

Responsible Entity Certifying Officer signature and date: _____